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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRUCE ALLEN, Petitioner, v. **MATTHEW CATE, SECRETARY,** Respondent.	08-CV-1123 L (CAB) **RESPONDENT'S NOTICE OF MOTION AND MOTION TO DISMISS; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES** Judge: The Honorable Cathy Ann Bencivengo

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TO PETITIONER BRUCE ALLEN, IN PRO PER:

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 2254 and Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts, Respondent moves the Court for an order dismissing the above-entitled action on the ground that Petitioner filed an untimely petition beyond the one-year statute of limitations. This motion is based on the notice and motion; the supporting memorandum of points and authorities and exhibits; and the pleadings, records, and files in this action.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In his Petition for Writ of Habeas Corpus, Petitioner Bruce Allen claims that the retroactive repeal of California Code of Regulations, Title 15, section 2817, in 1994, violated the ex post facto clause as applied to him. The Petition, however, must be dismissed because it is untimely.

SUMMARY OF RELEVANT FACTS

Petitioner is serving life without the possibility of parole following his 1983 conviction of two counts of first degree murder with use of a firearm and attempted murder inflicting great bodily injury. (Pet., p. 2.) At the time of his conviction, section 2817 of the California Code of Regulations provided that certain prisoners serving life without the possibility of parole would receive a review hearing within twelve years of their prison reception to determine whether they were suitable for sentence commutation. The Board of Parole Hearings (Board) repealed section 2817, effective January 19, 1994. Over thirteen years later, on June 18, 2007, Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Imperial County challenging the retroactive repeal of section 2817. (Pet., Ex. H, p. 1.) Petitioner pursued his state judicial remedies by filing petitions for writs of habeas corpus in the California Court of Appeal and in the California Supreme Court, but the petition were ultimately denied by both courts. (Pet., pp. 4, 6.)

ARGUMENT

THE PETITION IS BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS.

District courts may take an active role in summarily disposing of facially defective habeas petitions that do not support a finding that the petitioner is entitled to relief. Rules Governing § 2254 Cases, Rule 4. A motion to dismiss is a proper response to such petitions. *Id.*

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a one-year statute of limitations for 28 U.S.C. § 2254 habeas petitions. "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). In habeas petitions that challenge decisions of administrative bodies such as parole boards, subparagraph (D) of § 2244(d)(1) applies and the one-year limitations period starts to run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(D); *Shelby v. Bartlett*, 391 F.3d 1061, 1066 (9th Cir. 2004); *see also Redd v. McGrath*, 343 F.3d 1077, 1081-82 (9th Cir. 2003).

Petitioner claims his rights were violated by the Board's January 19, 1994 repeal of section 2817 of the California Code of Regulations. (*See* Pet.) Accordingly, the "factual predicate," or the basis of Petitioner's claims that his rights were violated, is January 20, 1994, when petitioner could have discovered that the section was repealed. At the latest, Petitioner discovered the factual basis of his claim in February of 1995, when Petitioner claims he should have received his initial review hearing under section 2817. (Pet., p. 7.) Petitioner filed a petition for writ of habeas corpus in the Superior Court of Imperial County on June 18, 2007, over thirteen years after the date on which the factual predicate of the claim could have been discovered. Thus, the statute of limitations was exceeded, and the petition must be dismissed. 28 U.S.C. § 2244(d)(1).

CONCLUSION

Because Petitioner failed to bring this habeas action within the AEDPA one-year statute of limitations, the Petition is time barred and must be dismissed.

Dated: August 11, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE BY U.S. MAIL

Case Name: **Allen v. Cate**

Case No.: **08-CV-1123 L (CAB)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 11, 2008, I served the following documents:

RESPONDENT'S NOTICE OF MOTION AND MOTION TO DISMISS; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Manual Notice List

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

Bruce Allen
CDC #C-61243
Calipatria State Prison
P.O. Box 5001
Calipatria, CA 92233-5001

In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 11, 2008, at San Diego, California.

M. Torres-Lopez
Declarant

Signature

SD2008700685
70133219.wpd